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No. 01-963

IN THE

Supreme Court of the United States

NORFOLK & WESTERN RAILWAY COMPANY,
Petitioner,

v.

FREEMAN AYERS, ET AL.,
Respondents.

On Writ of Certiorari to the Circuit Court of Kanawha County, West Virginia

BRIEF OF THE AMERICAN INSURANCE ASSOCIATION AS AMICUS CURIAE SUPPORTING PETITIONER

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INTEREST OF THE AMERICAN INSURANCE ASSOCIATION

Founded in 1866 as the National Board of Fire Underwriters, the American Insurance Association (AIA) is a national trade association representing 410 companies writing property and casualty insurance in every state and jurisdiction of the United States.[1] AIA members write insurance that covers asbestos-related liabilities of their insureds. AIA filed an amicus brief supporting the petitioner in *Metro-North Commuter Railroad Co. v. Buckley*, 521 U.S. 424 (1997), in

[1] Counsel for AIA authored this brief in its entirety. No person other than AIA, its members or its counsel made a monetary contribution to the preparation or submission of the brief. The parties' written consent to the filing of this brief has been filed with the Court.

which the Court concluded that mere exposure to a potentially toxic substance could not support an award of damages for emotional distress under the Federal Employers Liability Act. Here, as in *Buckley*, allowing respondents to recover for "fear of cancer" would distort sound principles of tort law and jeopardize the ability of the courts and the insurance industry to provide fair compensation to those who sustain actually injuries fairly attributable to the breach of a legal duty.

INTRODUCTION AND SUMMARY OF ARGUMENT

Respondents sued petitioner in state court under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51 *et seq.*, seeking damages for injuries allegedly sustained as a result of occupational exposure to asbestos. The evidence at trial included medical testimony to the effect that each respondent suffered from asbestosis or a similar condition, and that exposure to asbestos had increased each respondent's risk of developing some form of cancer at some point in the future. *See* Br. in Opp. 4-5. The court instructed the jury that there was no evidence that any respondent "has cancer or that he will, with reasonable certainty develop cancer in the future," so the jury could not "award damages . . . for cancer or for any increased risk of cancer." J.A. 573. It further instructed, however, as follows:

> You have heard a great deal of testimony regarding cancer and increased risk of cancer. This testimony is relevant only to judge the genuineness of plaintiffs' claims of fear of developing cancer. As an integral part of damages for mental pain and suffering, any plaintiff who has demonstrated that he has developed a reasonable fear of cancer that is related to proven physical injury from asbestos is entitled to be compensated for that fear as a part of the damages you may award for pain and suffering.

Id.[2] The jury found that each respondent had suffered damages ranging from $770,000 to $1.2 million. After offsets for other settlements and, in three instances, reductions for contributory negligence through smoking, the court entered final damage awards ranging from $523,000 to somewhat over $1 million. *See* J.A. 578-589.

The substantial damage awards in this case accordingly appear to have been based in part on "fear of cancer." The instruction that permitted that conclusion exemplifies a widespread confusion in the law concerning when it is appropriate to award damages for such fear in asbestos cases. Petitioner is surely correct that any plaintiff who seeks to recover such damages under FELA should, at a minimum, be required to prove some substantial physical manifestation of the claimed emotional distress. There are, however, two closely related but logically antecedent points that this Court should address before reaching the physical-manifestation issue. *See Vance v. Terrazas*, 444 U.S. 252, 258-59 n.5 (1980) (point may be considered where it is "predicate to an intelligent resolution" of the question presented); *Cuyler v. Sullivan*, 446 U.S. 335, 342-43 n.6 (1980) (same); *United States v. Mendenhall*, 446 U.S. 544, 551-52 n.5 (1980) (same).[3]

First, FELA does not permit recovery for fear of developing, in the future, a disease that the plaintiff does not now

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[2] The court instructed generally that if petitioner was found liable, each respondent was entitled to recover for, among other things, "injury or impairment and physical and mental pain and suffering in the past; [and] any injury and impairment and physical and mental pain and suffering that may reasonably be expected to occur in the future." J.A. 573.

[3] The Court should in any event make clear, for the benefit of the lower courts and the bar, that any holding on the question whether recovery for emotional distress requires evidence of a "physical manifestation," *see* Pet. i, does not resolve the logically prior issues that we address in this brief. In particular, the Court should clarify that *Buckley* does *not* hold that FELA permits recovery for "fear of cancer" whenever a plaintiff can show evidence of asbestosis. *See* Br. in Opp. 21.

have and may well never contract. The Court reached that conclusion in *Metro-North Commuter Railroad Co. v. Buckley*, 521 U.S. 424 (1997), and there is no reason for a different result here. The law restricting the award of such damages cannot be avoided simply by characterizing them as an element of "pain and suffering" associated with a *different* disease or medical condition that the plaintiff *does* have. Apart from that instructional error, this case differs from *Buckley* only in that the plaintiffs produced evidence that they have asbestosis. But while asbestosis confirms that a plaintiff was exposed to asbestos — a point that was not disputed in *Buckley* — it is not cancer, is not a symptom of cancer, and does not evolve into or lead to cancer. Accordingly, evidence of asbestosis does not in any way affect *Buckley*'s reasons for refusing to authorize the award of damages for "fear of cancer" under FELA.

Second, another well established limit on emotional-distress damages is that to be compensable, a plaintiff's alleged fears must be reasonable. That requirement is not self-defining, particularly in the fear-of-cancer context. Many courts seem to have confused the question whether such fear is reasonable with the question whether the underlying toxic exposure has given rise to any present physical injury, such as asbestosis. If, however, there is to be liability for "fear of cancer" at all, the better approach would be to confront the question directly, and to require fear-of-cancer claimants to prove that they are *more likely than not* to develop cancer.

That probability would, moreover, have to arise from the alleged toxic exposure, not from some other cause. As even the court below recognized, respondents could not meet those standards. In particular, all but one of the respondents in this case were current or former smokers. Smoking is the overwhelmingly predominant cause of lung cancer. Given the medical evidence that petitioner has marshaled concerning the risks and causes of cancer, it would be unreasonable to impose a legal duty on petitioner with respect to respondents' alleged fears of developing cancer. Simply stated, if plaintiffs who smoke have a fear of cancer, that fear is reasonably related to their smoking — not to the violation of any legal duty owed by a FELA defendant.

ARGUMENT

I. FELA DOES NOT ALLOW RECOVERY FOR FEAR OF A DISEASE THAT THE PLAINTIFF DOES NOT HAVE AND MAY NEVER DEVELOP

This Court held in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 547-48 (1994), that FELA plaintiffs may recover damages for negligent infliction of emotional distress if they can satisfy the "zone of danger" test, by showing that the defendant's negligence led to some "physical impact" on the plaintiff, or put the plaintiff at "immediate risk" of such an impact. In *Metro-North Commuter Railroad Co. v. Buckley*, 521 U.S. 424 (1997), the Court considered the application of those standards to a case much like this one, and concluded that they did *not* permit recovery for emotional distress merely on the basis of exposure to "a substance that might cause a disease at a future time." *Id.* at 430. Rather, a worker negligently exposed to asbestos may not recover for emotional distress under FELA "unless, and until, he manifests symptoms of a disease." *Id.* at 427; *see also id.* at 430.

A. A Plaintiff May Not Recover for Fear of Cancer as Part of the Pain and Suffering Associated With Asbestosis

The trial court charged the jury in this case on the theory that respondents were entitled to recover for fear of cancer as part of ordinary pain-and-suffering damages on their claim for the disease of asbestosis — the only physical injury they have alleged. As petitioners have pointed out (Pet. 12), however, a plaintiff normally may recover only for pain and suffering that is directly related to the physical injury that provides the principal basis for a claim. *See, e.g., Barron v. Martin-Marietta Corp.*, 868 F. Supp. 1203, 1211 (N.D. Cal. 1994) (damages for fear of cancer are recoverable where they are "derivative" of serious physical injury, but they must be

"parasitic of the physical injury involved" — *i.e.*, there must be "a verifiable causal nexus between cancer and the injury suffered"); *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 805 (Cal. 1993) (where negligence causes injury, "anxiety specifically due to a reasonable fear of a future harm *attributable to the injury* may also constitute a proper element of damages" (emphasis added)); *Shumosky v. Lutheran Welfare Servs. of Northeastern Pa., Inc.*, 784 A.2d 196, 201 (Pa. Super Ct. 2001) ("[P]arasitic damages for fear of AIDS are available where there is a verifiable causal connection between the injury and the possible development of AIDS.").[4]

Thus, a plaintiff with a present physical injury of asbestosis may recover for the pain and suffering caused by *that* injury up to the time of trial, and for similar pain that it may reasonably be expected to cause in the future. The recovery may include damages for reasonable past fear that the defendant's negligence would lead to asbestosis (a fear confirmed by the development of the injury itself), and for reasonable fear about the future progress or complications of *that* disease. The injury of asbestosis provides, however, no sufficient basis for awarding damages for fear of some *other* disease, such as cancer. *See Barron*, 868 F. Supp. at 1211 ("If no nexus were required between cancer and an alleged injury, an injury akin to a spinal puncture, serious but unrelated to

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[4] Consequential damages for a present physical injury may also include compensation for the risk of reasonably certain future physical injuries, at least where a jurisdiction's rules concerning claim-splitting would preclude a later action based on those injuries. *See, e.g., Dillon v. Evanston Hosp.*, ___ N.E.2d ___, 2002 WL 1038725, at *6-*9 (Ill. May 23, 2002). Most courts hold that such "risk" recovery (which is distinct from the "distress" recovery at issue here) requires a showing that the plaintiff will more likely than not suffer the future injury, although some courts have relaxed that rule. *See id.* at *8-*13. The trial court in this case followed the majority rule, instructing the jury that it could not award damages for any increased *risk* of cancer, because "none of the plaintiffs ha[s] offered evidence that he . . . will, with reasonable certainty develop cancer in the future." J.A. 573.

cancer, would admit recovery of parasitic damages for fear of cancer. Indeed, any serious physical injury, however unrelated to cancer, would permit fear-of-cancer damages.").

B. *Buckley* Precludes an Award for "Fear of Cancer" as Recovery for Emotional Distress Under FELA

Any award of damages for fear of cancer in this case must therefore be defended, if at all, on the ground that it satisfies the requirements established in *Gottshall* and *Buckley* for the recovery of FELA damages for negligent infliction of emotional distress. Respondents appear to acknowledge this point, arguing that their recovery for "emotional distress, including fear of cancer" is "consistent with" *Buckley* because they, unlike the plaintiff in *Buckley*, have "manifest[ed] symptoms of a disease" — *i.e.*, asbestosis (or, in any event, some "occupational pneumoconios[is]"). Br. in Opp. 21 (in part quoting *Buckley*, 521 U.S. at 427); *see id.* at 21-22. That argument, however, seriously misreads *Buckley*'s reasoning.

Buckley squarely held that FELA plaintiffs cannot recover for negligent infliction of emotional distress based solely on exposure to some potentially toxic substance (there, as here, asbestos) that leads them to fear the development of a disease in the future. *See* 521 U.S. at 427, 430. On the other hand, the Court recognized that, as discussed above, the common law permits recovery for emotional distress, including past fear, as an element of pain and suffering, where the plaintiff has in fact contracted *the feared disease*, as demonstrated by recognized symptoms. *See id.* at 429-30 (citing *Simmons v. Pacor, Inc.*, 674 A.2d 232, 239 (Pa. 1996) (noting that plaintiff may recover for prior fear *after* contracting cancer), and *Restatement (Second) of Torts* § 924(a) (1977) (stating that a plaintiff may recover for emotional distress as part of the ordinary damages for actual injury)). The Court's discussion implies, but does not directly resolve, an intermediate question: Should there be FELA recovery for fear of a particular disease when a plaintiff can show some physical

indication (such as pleural thickening or asbestosis) that confirms or follows from toxic exposure, but that is not a symptom of the disease the plaintiff claims to fear (here, cancer)?

Out of context, *Buckley*'s summary of its holding — that a worker exposed to asbestos "cannot recover [for emotional distress] unless, and until, he manifests symptoms of *a* disease," 521 U.S. at 427 (emphasis added) — could perhaps be read to suggest that an exposed worker who shows symptoms of *any* disease, including asbestosis, may then recover for *any sort* of emotional distress, including fear of cancer. Read as a whole, however, *Buckley* controls, and disposes of, respondents' fear-of-cancer claim.

1. Respondents Were Never Placed in Imminent Danger of Immediate Physical Harm

Both *Buckley* and *Gottshall* recognized that a claim for negligent infliction of emotional distress requires proof that the defendant exposed the plaintiff to a risk of immediate physical injury. In *Gottshall*, the Court held that plaintiffs can recover for emotional distress under FELA if they either sustain a "physical impact" as a result of the defendant's negligent conduct or are "placed in immediate risk of physical harm by that conduct." 512 U.S. at 547-48. This "zone of danger" standard permits plaintiffs "to recover for injuries — physical and emotional — caused by the negligent conduct of their employers *that threatens them imminently with physical impact*." *Id.* at 556 (emphasis added).

In tracing the history of the emotional-distress tort, *Gottshall* explained that the earliest cases allowed recovery only where a plaintiff suffered a physical injury from a sudden, traumatic event. *Id.* at 554-55; *see, e.g., Mitchell v. Rochester Ry. Co.*, 45 N.E. 354 (N.Y. 1896) (no recovery for fright from near collision with horse cart); *Ewing v. Pittsburgh, C., C. & St. L. Ry. Co.*, 23 A. 340 (Pa. 1892) (denying recovery for fright without physical injury from train accident on plaintiff's property); *see also Bass v. Nooney Co.*, 646 S.W.2d 765, 768 (Mo. 1983) (under traditional rule, there

was no recovery "unless the plaintiff suffered a contemporaneous traumatic physical injury"). Indeed, in these cases, emotional distress was not an independent basis for liability, but an item of "parasitic" damages for a tort involving physical injury. *See* Speiser, Krause & Gans, *The American Law of Torts* 943-44 (1987); *Crisci v. Security Ins. Co.*, 426 P.2d 173 (Cal. 1967) (awarding damages for mental distress in addition to physical injuries sustained from near fall from defective stairway); *see also* pp. 5-7, *supra*. Many courts eventually relaxed the requirement of physical *injury* and began to permit recovery for emotional distress associated with mere physical "impacts" — but they continued to require that the impact flow from a danger that was immediate and imminent. *See, e.g., Grube v. Union Pac. R.R. Co.*, 886 P.2d 845, 851 (Kan. 1994) (denying recovery, despite impact, because alleged distress did not result from "imminent apprehension of physical harm").

Recognizing that "'a near miss may be as frightening as a direct hit,'" *Gottshall*, 512 U.S. at 547 (quoting Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm — A Comment on the Nature of Arbitrary Rules*, 34 U. Fla. L. Rev. 477, 488 (1982)), some courts began to credit ever slighter "impacts." *See, e.g., Porter v. Delaware, L. & W. R.R.*, 63 A. 860, 860 (N.J. 1906) (recovery for fright from bridge collapse where plaintiff alleged "that she was hit on the neck by something, and that dust from the falling debris went into her eyes"). Other courts expanded the impact test into the more frankly capacious zone-of-danger test. *See Bloom v. Consolidated Rail Corp.*, 41 F.3d 911, 916 n.6 (3d Cir. 1994) ("As courts increasingly adopted the zone of danger test, the need to stretch the definition of physical impact dissipated."). That test "was recognized as being a progressive rule of liability that was less restrictive than the [pure] physical impact test." *Gottshall*, 512 U.S. at 555. As in the original physical-impact cases, however, the "near miss" recognized by the zone-of-danger test is a near miss of imminent

physical harm. *See Buckley*, 521 U.S. at 430-31; *Gottshall*, 512 U.S. at 547-548 & n. 9 (collecting cases).[5]

Buckley reiterated *Gottshall*'s understanding of this history, and of the kinds of harms that emotional-distress recovery is intended to address. Indeed, in concluding that mere exposure to a toxic substance was *not* the sort of "physical impact" that would allow recovery for emotional distress, *Buckley* emphasized that the cases cited by *Gottshall* in adopting the zone-of-danger test all "involved a threatened physical contact that caused, or might have caused, immediate traumatic harm." 521 U.S. at 430-31 (citing cases). Here, however, just as in *Buckley*, respondents' alleged fear that they might develop cancer arises not from any "threatened physical contact" or "immediate traumatic harm," but from exposure to asbestos, over a long period and during routine employment activities, that, it turns out, "might cause a disease at a substantially later time." *Id.* at 430. And just as in *Buckley*, their claim for compensation for that alleged fear is too far removed from the core of the emotional-distress tort to justify recovery under FELA.

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5 *See also, e.g., Garcia v. Burlington N. R.R. Co.*, 904 P.2d 1085, 1087 (Or. Ct. App. 1995) ("The zone of danger is a location in which the plaintiff is at 'immediate risk of physical harm.'") (quoting *Gottshall*, 512 U.S. 548)); *McMillan v. National R.R. Passenger Corp.*, 648 A.2d 428, 434 (D.C. 1994) (the zone-of-danger concept requires that a plaintiff show that his "physical safety was imminently endangered"); *Falzone v. Busch*, 214 A.2d 12, 17 (N.J. 1965) (zone test limits recovery to situations in which "negligence causes fright from a reasonable fear of immediate personal injury"); *Dulieu v. White & Sons*, 2 K.B. 669, 675 (1901) (distress is compensable only if it "arises from a reasonable fear of immediate personal injury to oneself").

2. Cases Allowing Recovery for Fear of Cancer Based on Asbestos Exposure Go Beyond the Limited Right of Recovery Recognized in *Gottshall* and *Buckley*

Recently, some courts have expanded the emotional-distress tort beyond cases involving threatened traumatic injury and allowed recovery for fear of developing a disease. Those cases are inconsistent with the careful, historically bounded approach adopted by this Court's FELA cases.

In one category of cases, some courts have permitted recovery for fear of cancer or other diseases where the plaintiff has been exposed to toxic substances over long periods of time. In *Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188 (6th Cir. 1988), for example, the court permitted emotional-distress recovery for fear of developing cancer in the future from long-term exposure to contaminated drinking water. Similarly, in *Laxton v. Orkin Exterminating Co.*, 639 S.W.2d 431 (Tenn. 1982), the court permitted recovery for fear of cancer and other diseases arising from drinking contaminated water over a period of eight months. *See also Day v. NLO*, 851 F. Supp. 869 (S.D. Ohio 1994) (fear of cancer after occupational exposure to radiation); *Stites v. Sundstrand Heat Transfer, Inc.*, 660 F. Supp. 1516, 1526 (W.D. Mich. 1987) (fear of cancer from exposure to chemicals leaking from manufacturing plant).

In another category of cases arising in the last two decades, courts have evaluated claims of emotional distress brought by plaintiffs who suffered some potential exposure to the virus that causes AIDS. While these cases allow recovery for a period of distressing uncertainty resulting from such exposure, they bear a close resemblance to traditional emotional-distress cases because they involve a sudden, traumatic harm such as a needle-stick or other specific contact with an infected bodily fluid, giving rise to an immediate (and limited) period of uncertainty and concern before it can be determined whether actual infection has occurred. Indeed,

Buckley cited *Marchica v. Long Island R.R. Co.*, 31 F.3d 1197 (2d Cir. 1994), a fear-of-AIDS case involving a needle-stick, as a case involving "traumatic injury," and therefore falling "within a category where the law already permitted recovery for emotional distress." 521 U.S. at 437; *see also Faya v. Almaraz*, 620 A.2d 327, 336-37 (Md. 1993) (permitting recovery for the "reasonable window of anxiety" until plaintiff conclusively tested negative for HIV, where doctor performed invasive operation without informing patient that he was HIV-positive); *Hartwig v. Oregon Trail Eye Clinic*, 580 N.W.2d 86, 95 (Neb. 1998) (permitting recovery for fear of AIDS after needle-stick). Moreover, fear-of-AIDS cases are quite different from fear-of-cancer cases involving long-term exposure to toxic substances. After exposure to HIV, "an individual does not become more likely to develop [HIV-infection] in the future; one either acquires the [infection] as a result of the exposure or one does not." Cantley, *Every Dogma Has Its Day: Cancerphobia Precedent in Fear of AIDS Cases*, 40 Brandeis L.J. 535, 552 (2001). The fear-of-AIDS cases accordingly lend no substantial support to the type of claim at issue in this case.

Perhaps the largest category of cases in which courts have expanded emotional-distress recovery beyond the immediate zone of danger of traumatic injury are those involving exposure to asbestos — essentially one variation of the toxic-exposure cases noted above. In *Eagle-Picher Industries, Inc. v. Cox*, 481 So. 2d 517, 528 (Fla. Dist. Ct. App. 1985), for example, the court permitted recovery for fear of cancer where the plaintiff was exposed to asbestos over many years and demonstrated a present physical injury of asbestosis. Similarly, in *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 413-15 (5th Cir. 1986) (en banc), the court permitted recovery for fear of cancer resulting from asbestos exposure during plaintiff's employment as a shipyard worker. *See also Herber v. Johns-Manville Corp.*, 785 F.2d 79, 83-85 (3d Cir. 1986) (fear-of-cancer claim based on asbestos exposure over time and plaintiff's symptoms of pleural thickening);

Farall v. A.C. & S. Co., 558 A.2d 1078 (Del. Super. Ct. 1989).

Because these claims involve fear arising from long-term exposure and an uncertain future harm, rather than emotional trauma resulting from a threat of sudden calamity, they fall well outside the scope of the zone-of-danger test adopted in *Gottshall* and *Buckley* for emotional-distress claims under FELA. In fact, such fear-of claims were completely unknown at the time of FELA's passage in 1908.[6] As the Delaware courts have recognized, asbestos-related injuries bear no resemblance to the kinds of harms traditionally compensated through independent emotional-distress claims, because "[c]linical symptoms may not be observable until after many years of exposure, and disability may progress even after exposure has ceased. [Thus], [t]he nature of asbestos-related injury, whether considered on an exposure or a manifestation basis is clearly incompatible with the traumatic event requirement for recovery of mental anguish . . . ." *Nutt v. A.C. & S., Inc.*, 466 A.2d 18, 25 (Del. Super. Ct. 1983), *aff'd sub nom. Mergenthaler v. Asbestos Corp. of America*, 480 A.2d 647 (Del. 1984); *see also Adams v. Johns-Manville Sales Corp.*, 783 F.2d 589, 593 (5th Cir. 1986) (distinguishing "mental anguish engendered by a proven traumatic ordeal which did not result in physical injury" from "mental anguish arising from fear of future complications").

Accordingly, if courts allow recovery for fear of a possible future disease (other than under the traditional rules for pain-and-suffering damages), they should frankly recognize

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6 *Alley v. Charlotte Pipe & Foundry Co.*, 74 S.E. 885, 886 (N.C. 1912), is one of the earliest cases that allowed recovery for fear of cancer. But in that case, the plaintiff's fear resulted from a sudden physical impact (an explosion that caused a burn), and in any event what the court allowed was consequential damages for the emotional distress that the plaintiff experienced from fear of future cancer resulting directly from the burn. *See also Ferrara v. Galluchio*, 5 N.Y.2d 16, 21 (1958) (permitting recovery for fear of cancer resulting from X-Ray burn).

that they are creating a new tort. Indeed, some courts have understood and rejected the invitation to do so. *See, e.g., O'Banion v. Owens-Corning Fiberglas Corp.*, 968 F.2d 1011, 1013 (10th Cir. 1992) (noting that "there is no Oklahoma case law which addresses whether damages may be recovered for the fear of an increased risk of developing cancer later in life," and rejecting such a claim as overly speculative); *see also* Henderson & Twerski, *Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 59 Univ. S. Carolina L. Rev. ___ (forthcoming Summer 2002). That is the correct approach.

Fear-of-cancer claims compensate plaintiffs for harm directly related to a physical injury (the disease itself) that they may never contract. Moreover, as the Court recognized in *Buckley*, plaintiffs can presumably recover for emotional distress for fear of cancer as an element of pain and suffering *related to cancer*, if and when they in fact contract that disease. *See Buckley*, 521 U.S. at 429-30 (citing *Simmons v. Pacor*, 674 A.2d at 239). Thus, as the Pennsylvania Supreme Court has explained, denying claims for fear of cancer does not mean that individuals who eventually suffer the actual physical injury of cancer are "left without a remedy for their mental anguish." *Simmons*, 674 A.2d at 239. There is accordingly no adequate reason to expand the ability to recover for emotional-distress beyond the traditional "specific categories," amounting to "recovery-permitting exceptions," that this Court recognized in *Buckley* and *Gottshall*.

Finally, unlike conventional emotional-distress claims, which are limited by the need to prove an immediate risk of traumatic harm, fear-of-cancer claims resulting from long-term, possibly toxic exposures have no adequate limiting principle. As *Buckley* recognized, "contacts, even extensive contacts, with serious carcinogens are common." 521 U.S. at 434. And, therefore, as the California Supreme Court has noted, "all of us are potential fear of cancer plaintiffs, provided we are sufficiently aware of and worried about the possibility of developing cancer from exposure to or ingestion of a carcinogenic substance. The enormity of the class of potential plaintiffs cannot be overstated . . . ." *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 812 (Cal. 1993). Fear-of-cancer claims divorced from the longstanding context of imminent traumatic harm thus create just the "specter of unlimited and unpredictable liability," the "potential for a flood of trivial suits," and the "possibility of fraudulent claims" about which *Gottshall* and *Buckley* warned. *Gottshall*, 512 U.S. at 557; *Buckley*, 521 U.S. at 435. As the Supreme Court of Texas has explained:

> A person exposed to asbestos can certainly develop serious health problems, but he or she also may not. The difficulty in predicting whether exposure will cause any disease and if so, what disease, and the long latency period characteristic of asbestos-related diseases, make it very difficult for judges and juries to evaluate which exposure cases are serious and which are not. . . . Some claimants would inevitably be overcompensated when, in the course of time, it happens that they never develop the disease they feared, and others would be undercompensated when it turns out that they developed a disease more serious even than they feared.

Temple-Inland Forest Prods. Corp. v. Carter, 993 S.W.2d 88, 93 (Tex. 1999).

3. This Court Should Not Redefine Emotional-Distress Recovery Under FELA To Permit Claims for Fear of Cancer

Because fear-of-cancer claims based on asbestos exposure do not fall within the traditional categories of emotional-distress recovery, the real question here, as in *Buckley*, is whether the Court should "redefine" one of the common law's "special recovery-permitting categories" to allow recovery for fear of cancer under factual circumstances like those presented here. 521 U.S. at 436-37. As in *Buckley*, the

proper answer is no — because here, as in *Buckley*, respondents' claim ultimately rests on nothing more than exposure.

The only factual difference between respondents' claims and those presented in *Buckley* is that respondents apparently suffer from asbestosis. On that basis they claim that they have shown "symptoms of a disease," and have therefore "me[t] th[e] requirement[s]" for emotional distress claims set out in *Buckley*. Br. in Opp. 21 (in part quoting *Buckley*, 521 U.S. at 427). But *Buckley* did not hold that asbestosis is a "physical symptom" of cancer. 521 U.S. at 436. If it were, then respondents would have a claim for ordinary damages, including emotional distress, for the injury of cancer — because, as *Buckley* recognized, "[t]he common law permits emotional distress recovery for that category of plaintiffs who suffer from a disease (or exhibit a physical symptom)." *Id.* But although there are various different disease processes that may be associated with asbestos exposure — including pleural thickening, asbestosis, lung cancer, and mesothelioma — there is no established connection among those conditions, and none of them evolves into another. Indeed, a number of courts have recognized that asbestosis and asbestos-related cancers are not medically linked. *See, e.g.*, *Kilpatrick v. Dep't of Labor*, 883 P.2d 1370, 1375 (Wash. 1994); *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111, 117 (D.C. Cir. 1982); *Eagle-Picher*, 481 So. 2d at 522.

Nor did *Buckley* hold that FELA permits emotional-distress recovery for fear of cancer simply because a plaintiff manifests symptoms of some *other* disease, such as asbestosis. To the contrary, it held that exposure to asbestos fibers, which threaten no traumatic harm but only long-term, disease-related risks, does not amount to a "physical impact" (or, *a fortiori*, to the creation of an "immediate risk") so as to authorize recovery for emotional distress under traditional limitations, which the Court adopted for purposes of FELA. *See* 521 U.S. at 428-29, 430, 438. The Court's references to "physical symptoms" served to distinguish Buckley's stand-alone claim for fear of cancer from a claim for fear or other

emotional distress as conventional pain-and-suffering damages incident to a claim for actual, present injury. As we have explained, no such claim for fear of *cancer* lies here, where respondents' only present injury is asbestosis. Accordingly, nothing in *Buckley*'s holding or reasoning supports the conclusion that by merely presenting evidence of asbestosis, respondents satisfy the legal predicates necessary to recover on an independent claim for fear of cancer.[7]

To the contrary, so far as an emotional-distress claim is concerned, asbestosis is merely a proxy for *exposure* to asbestos — which *Buckley* has already held is insufficient to state a claim for fear of cancer under FELA. *See Buckley*, 521 U.S. at 430, 432. Because the presence of asbestosis — the only asserted factual difference between this case and

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[7] One passage in *Buckley* (521 U.S. at 437) does cite *Lavelle v. Owens-Corning Fiberglas Corp.*, 507 N.E.2d 476 (Ohio Ct. Com. Pl. 1987), in which a plaintiff with asbestosis sought emotional distress damages for fear of cancer. *See also* Br. in Opp. 21. The context of the citation in *Buckley* makes clear, however, that the Court cited *Lavelle* merely as an example of a type of case in which the common law conventionally permitted recovery for emotional distress — effectively assuming, without deciding, that *Lavelle* had correctly concluded that the case of an "asbestosis-afflicted plaintiff" fell into "a category where the law already permitted recovery for emotional distress." 521 U.S. 437. In fact, *Lavelle* itself *rejected* a consequential-damages claim for *risk* of cancer, on the sound view that "a plaintiff stricken with asbestosis has no stronger cause of action for cancer than one with *no* disease manifestation at all." 507 N.E.2d at 479. It did permit the plaintiff to "introduce evidence regarding his increased fear of cancer," but on the alternative grounds that (i) "[m]odern tort law" permits recovery for emotional distress without any proof of physical injury, and (ii) the "traditional rule" requiring "physical impact" was satisfied by proof of "a physical contact with the [asbestos] fibers, which initiated [the plaintiff's] physical injuries." *Id.* at 480-81. In the FELA context, *Gottshall* rejected the first of those possible theories of recovery, and *Buckley* itself rejected the second. *Buckley*'s citation and parenthetical description of *Lavelle* are thus best read as a reference to *Lavelle*'s recitation of cases applying the "traditional rule" concerning "physical impact," not as an endorsement of *Lavelle*'s own construction or application of that rule.

Buckley — adds nothing to *Buckley*'s "physical impact" analysis, this case is legally identical to *Buckley* with respect to any independent claim for emotional distress. And because respondents cannot otherwise bring their fear-of-cancer claim within any of *Buckley*'s "special recovery-permitting categories," *id.* at 436-37, *Buckley* dictates reversal of the judgments below.

II. RESPONDENTS CANNOT SHOW THAT THEY HARBOR ANY REASONABLE FEAR OF CANCER FOR WHICH PETITIONER MAY FAIRLY BE HELD RESPONSIBLE

A. Courts Permit Recovery for Emotional Distress Only Where a Plaintiff's Fears Are Reasonable

Gottshall and *Buckley* make clear that in fashioning rules of recovery under FELA, this Court respects the limits that common-law courts traditionally imposed on the availability of damages for emotional distress. *See Gottshall*, 512 U.S. at 543-44; *Buckley*, 521 U.S. at 429-32. As we have shown, the fear-of-cancer damages claimed in this case are not consistent with the "physical impact" or "zone of danger" limitations at issue in those cases. There is also, however, another restriction that courts have imposed on emotional-distress claims, and that respondents' fear-of-cancer claims cannot satisfy: To be compensable, a plaintiff's alleged fear must be *reasonable*.

In cases alleging negligent infliction of emotional distress, "[t]here is no recovery for hypersensitive mental disturbance where a normal individual would not be affected under the circumstances." *Daley v. LaCroix*, 179 N.W.2d 390, 395 (Mich. 1970); *see also Payton v. Abbott Labs.*, 437 N.E.2d 171, 179 (Mass. 1982); *Rodrigues v. State*, 472 P.2d 509, 520 (Haw. 1970) ("[S]erious mental distress may be found where a reasonable [person], normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case."). Unlike in cases involving unexpected or even unforeseeable physical

injuries, in which defendants must typically take plaintiffs as they find them (*see, e.g., Restatement (Second) of Torts* § 461 (1965)), in cases alleging emotional harm a "defendant's standard of conduct is measured by the reactions to be expected of normal persons. Ordinarily, one does not have a duty to be careful not to shock or frighten people. Activity may be geared to a workaday world rather than to the hypersensitive." 3 Harper, James & Gray, *The Law of Torts* 691 (2d ed. 1986); *see also Daley*, 179 N.W.2d at 395.[8] The application of such an objective standard provides an appropriate check on claims for emotional distress, particularly in light of courts' traditional concerns about allowing such claims at all.

The reasonableness standard applies to fear-of-cancer claims just as it does to other claims of emotional distress. *See Potter*, 863 P.2d at 811; *id.* at 810 ("[A] toxic exposure plaintiff is required to establish the reasonableness of his or her fear of cancer."); *Day v. NLO*, 851 F. Supp. at 878 ("mere exposure" is not enough to state a claim for fear of cancer from radiation; in order to demonstrate that "apprehensions of developing cancer are reasonable," plaintiffs must "present evidence which includes the risk of cancer"). Plaintiffs claiming fear of cancer accordingly bear the burden of demonstrating that their fears are not only subjectively genuine, but also objectively reasonable under all the circumstances of their particular cases. *See Potter*, 863 P.2d at 810-

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[8] *See also Marchica*, 31 F.3d at 1206 ("Where a claim of emotional distress is founded on the fear of developing a disease, the plaintiff must exercise due diligence to become familiar with the realities of the disease and the defendant should not be held liable for emotional distress to the extent the plaintiff's fear is based on ignorance."); *In re Hawaii Fed. Asbestos Cases*, 734 F. Supp. 1563, 1568-70 (D. Haw. 1990); *Beaty v. Buckeye Fabric Finishing Co.*, 179 F. Supp. 688, 696 (E.D. Ark. 1959) ("The mental anguish suffered, to be the basis for an allowance of damages, must be real and with cause and not merely the result of a too sensitive mind or morbid imagination.").

11.[9] "A carcinogenic, or other toxic ingestion or exposure, without more, does not provide a basis for fearing future physical injury or illness which the law is prepared to recognize as reasonable." *Id.* at 811. Indeed, manageable limits on liability are particularly critical in the context of fear-of-cancer claims, to avoid the "tremendous societal cost of otherwise allowing emotional distress compensation to a potentially unrestricted plaintiff class." *Id.* at 812; *see also Buckley*, 521 U.S. at 435 (in cases involving potentially carcinogenic exposures, "[t]he large number of those exposed and the uncertainties that may surround recovery . . . suggest what *Gottshall* called the problem of 'unlimited and unpredictable liability'").

B. Fear of Cancer Should Not Be Deemed Legally Reasonable Under FELA Unless the Plaintiff Is More Likely Than Not To Develop Cancer

The requirement that emotional distress, including fear of cancer, be "reasonable" is not self-defining.[10] The need to give the standard appropriate content is, moreover, both particularly vexing and particularly important in fear-of-cancer cases, for reasons that the Court described in *Buckley*, 521 U.S. at 434-35:

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[9] The reasonableness requirement is distinct from the requirement of a physical manifestation, or other objective proof of emotional injury, principally discussed in the petition (*see* Pet. 13-19). The manifestation requirement ensures that alleged emotional harm is *genuine*. The reasonableness requirement defines limits to the defendant's duty, and precludes recovery for unreasonable fear or distress even if it *is* genuine. *Cf. Buckley*, 521 U.S. at 436-38 (distinguishing question of genuineness from categorical limitations on recovery).

[10] The jury instructions in this case, for example, indicated that respondents were entitled to damages for any "reasonable fear of cancer . . . related to proven physical injury from asbestos," but they gave the jury no guidance in determining either what fears are legally "reasonable," or how fear of cancer could be medically "related" to respondents' abestosis. *See* J.A. 573.

> [C]ontacts, even extensive contacts, with serious carcinogens are common. . . . The relevant problem . . . [is therefore] one of evaluating a claimed emotional reaction to an *increased* risk of dying [arising from the particular exposure that is the basis of the plaintiff's suit.] An external circumstance — exposure — makes some emotional distress more likely. But how can one determine from the external circumstance of exposure whether, or when, a claimed strong emotional reaction to an *increased* mortality risk (say, from 23% to 28%) is reasonable and genuine, rather than overstated — particularly when the relevant statistics themselves are controversial and uncertain (as is usually the case), and particularly since neither those exposed nor judges or juries are experts in statistics?

Many courts considering fear-of-cancer claims seem to have confused the question whether such fear is reasonable with the question whether the underlying toxic exposure has given rise to any physical injury — such as asbestosis — for which the plaintiff is entitled to some present recovery. *See, e.g., Jackson*, 781 F.2d at 414 ("Jackson's distress is accompanied by a present *physical* injury: He has asbestosis."); *Devlin v. Johns-Manville Corp.*, 495 A.2d 495, 499 (N.J. Super. Ct. 1985) (permitting emotional-distress recovery for fear of cancer because plaintiffs were suffering from asbestosis); *Eagle-Picher*, 481 So. 2d at 527-28 (adopting physical-injury rule for fear-of-cancer claims and permitting recovery for plaintiff with asbestosis); *Landry v. Florida Power & Light Corp.*, 799 F. Supp. 94, 96-97 (S.D. Fla. 1992) (denying recovery for fear of cancer because plaintiff failed to show symptoms of any disease). Such cases typically cite evidence of asbestosis (or another non-cancerous condition, such as pleural thickening) to satisfy the "physical impact" or "zone of danger" requirement of emotional-distress law. *See, e.g., Herber*, 785 F.2d at 85; *Devlin*, 495 A.2d 495, 497-99 (foreseeable exposure put plaintiffs in the "zone of risk," and

asbestosis was sufficient to show the "[i]mmediate and direct physical impact and injury" necessary to establish an emotional-distress claim) (in part quoting *Ayers v. Jackson Twp.*, 461 A.2d 184, 189 (N.J. Super. Ct. 1983)). As discussed above, however, that is a misapplication of the common law's "special recovery-permitting categories." *Buckley*, 521 U.S. at 437. The analogy to "impact" (or "danger") in an asbestos case would be the asbestos exposure, not any physical condition that might result from that exposure — and *Buckley* already refused to accept that analogy. *See id.*

Some cases do focus at least in part on the theory that a present injury of asbestosis makes it more likely than it otherwise would be that a particular plaintiff who has been exposed to asbestos will eventually develop cancer. *See Eagle-Picher*, 481 So. 2d at 528-29 ("[A]lthough asbestosis and cancer are not medically linked in that asbestosis does not cause cancer, . . . plaintiffs with asbestosis may have a well-founded greater reason to fear contracting cancer than those who do not have asbestosis."). That theory is at least logically related to a question that courts *should* be asking, which is whether a plaintiff's asserted fear of cancer is reasonable. But if that is the question, it makes more sense to ask it directly, and to supply a legal standard for answering it.

One leading case that does address the question directly is the California Supreme Court's decision in *Potter*. The plaintiffs lived near a landfill in which the defendant had disposed of carcinogenic wastes. 863 P.2d at 801. None of the plaintiffs actually suffered from any cancerous or pre-cancerous condition, but each faced "an enhanced but unquantified risk of developing cancer in the future due to the exposure." *Id.* The court first concluded that there was insufficient evidence in the record to determine whether the plaintiffs had suffered any present physical injury that might allow recovery for anxiety as an element of ordinary damages, if the anxiety were "specifically due to a reasonable fear of a future harm attributable to the injury . . . ." *Id.* at 805-07; *see*

pp. 5-7, *supra*. It then held that it would consider the plaintiffs' claims for negligent infliction of emotional distress without regard to the traditional requirement that they show that the distress arose from a physical impact or near miss caused by the defendant. *Id.* at 808-10.

The court clearly recognized, however, that "permitting recovery for fear of cancer damages based solely upon a plaintiff's knowledge that his or her risk of cancer ha[d] been significantly increased by a toxic exposure, without requiring any further showing of the actual likelihood of the feared cancer due to the exposure, [would] provide[] no protection against unreasonable claims based upon wholly speculative fears." *Id.* at 811. It also took account of, among other things, the nearly universal exposure to carcinogens in the modern world, and the "tremendous societal cost of . . . allowing emotional distress compensation to a potentially unrestricted plaintiff class," *id.* at 812; the possibility that "allowing recovery to all victims who have a fear of cancer may work to the detriment of those who sustain actual physical injury and those who ultimately develop cancer," *id.* at 813; the need to "establish a sufficiently definite and predictable threshold for recovery to permit consistent application from case to case," *id.*; and the need to "limit the class of potential plaintiffs if emotional injury absent physical harm is to continue to be a recoverable item of damages," *id.* at 814 (internal quotation marks and citation omitted). The court concluded that in a stand-alone claim for fear of cancer, plaintiffs should be able to recover only for fear that "stems from a *knowledge*, corroborated by *reliable medical or scientific opinion*, that it is *more likely than not* that [they] will develop . . . cancer in the future due to the toxic exposure." *Id.* at 816 (emphasis added); *see also Barron*, 868 F. Supp. at 1211.

The concerns that led the *Potter* court to adopt a more-likely-than-not standard to test the legal reasonableness of fear-of-cancer claims apply with equal force to similar claims under FELA. As this Court recognized in *Buckley*, cases involving exposure to potentially carcinogenic substances pre-

sent serious claim-evaluation problems, and "[t]he large number of those exposed and the uncertainties that may surround recovery also suggest what *Gottshall* called the problem of 'unlimited and unpredictable liability.'" *Buckley*, 521 U.S. at 435 (quoting *Gottshall*, 512 U.S. at 557); *see also id.* at 433 (citing *Potter*'s standard), 433-36 (discussing reasons for restricting emotional-distress liability). Accordingly, in the unlikely event that respondents' claims survive scrutiny under *Buckley* itself, they should in any event fail because the more-likely-than-not standard should apply under FELA to implement the requirement that emotional-distress claims be legally reasonable. *See* J.A. 573 (jury instructions) ("[N]one of the plaintiffs ha[s] offered evidence that he actually has cancer or that he will, with reasonable certainty develop cancer in the future.").

C. Courts Cannot Reasonably Impose on Defendants a Duty To Protect Plaintiffs From Speculative Fears Concerning Cancer — Particularly Where Background Risks and a Plaintiffs' Own Conduct, Such as Smoking, Give Much Greater Cause for Concern

Finally, it bears emphasis that a finding of liability in a negligence case involves a declaration by the courts that the defendant had a legal duty to conduct itself so as not to impose on the plaintiff a particular harm. *See, e.g.*, Green, *Duties, Risks, Causation Doctrines*, 41 Tex. L. Rev. 42, 45-46 (1962) ("At the base of *every* tort case in which liability is imposed on a defendant, there *must* be a duty. . . . Further, the duty issue, for purposes of litigation, should always be stated specifically: Does the defendant's duty, whatever it may be, extend to the specific injury which the victim has received?"). Here, the necessary implication would be that petitioner had a duty to respondents not only to avoid causing them any actual physical injury through exposure to asbestos, but also to protect them from fear or worry that such exposure might ultimately cause them to develop cancer. As

Dean Green recognized, "[t]he determination of the issue of duty and whether it includes the particular risk imposed on the [plaintiff] ultimately rests upon broad policies which underlie the law." *Id.* at 45. The Court took account of just such policies in adopting appropriately limited rules of FELA liability in *Gottshall* and *Buckley*. Similar caution is appropriate here. In the present case, moreover, any holding of liability or duty would be particularly remarkable in the case of the five (out of six) respondents who are or were smokers. *See* Br. in Opp. 5-6.

Medical testimony at trial indicated that respondents' exposure to asbestos put them at greater risk for cancer; that respondents suffered from asbestosis or a related lung condition; and that with respect to lung cancer, there was a potential "synergy" between smoking-related and asbestos-related risks. *See* Br. in Opp. 4-5; J.A. 97. The first point, as we have explained, is insufficient to support emotional-distress recovery after *Buckley*. Asbestosis, while sometimes responsible for significant health impairment in its own right, does not progress to or evolve into cancer. And any "synergy" is, by definition, as much the result of smoking as of asbestos exposure. The trial court nonetheless instructed the jury that if it found that respondents had suffered any physical injury from asbestos, it could award them damages for "fear of cancer." J.A. 573.

That is not sensible legal policy, either in general or, particularly, here. As petitioner points out (*see* Pet. Br. 25), individuals in the United States unfortunately have a substantial *background* risk of contracting and dying from some form of cancer. Thus, even a non-smoking plaintiff who alleges a fear of getting cancer *from asbestos* cannot plausibly claim to be starting from a position of complete unconcern. The question is reasonable, *incremental* fear. Moreover, while asbestos exposure may cause either mesothelioma or lung cancer, the former is quite rare. *See id.* at 25. And as petitioner's summary of the medical literature demonstrates (*see id.* at 23-24), asbestos exposure, even when greater than

that experienced by respondents, likely produces only a moderately increased risk of lung cancer. Thus, a typical non-smoker, with a lung-cancer risk of approximately one percent, would likely have a risk of at most a few percent even after significant asbestos exposure. *See id.* at 24-25.

The case for incremental risk — or, more precisely, incremental fear — is even less convincing when, as is common, an asbestos fear-of-cancer plaintiff is or has been a smoker. *See id.* 23-35. Cigarette smoking is, of course, the overwhelmingly dominant cause of lung cancer. *See, e.g.*, Cagel, *Criteria for Attributing Lung Cancer to Asbestos Exposure*, 117 Am. J. Clin. Path. 9, 9 (2002) ("[A]bout 90% of all lung cancers are caused by tobacco smoking."). Asbestos exposure may increase a smoker's chance of contracting lung cancer, although on this point, as *Buckley* predicted would often be the case, "the relevant statistics themselves are controversial and uncertain." 521 U.S. at 435; *see* Pet. Br. 22-24. But in light of the myriad deleterious health effects of smoking, and the fact that any "synergy" of risks would not exist without the smoking risk, it seems clear that any *fear* of lung cancer that a smoker might experience cannot reasonably be separated from that dominant risk factor, or attributed to an asbestos defendant as a matter of tort-law duty.[11]

For present purposes, the available medical evidence marshaled by petitioner suggests two important points. First, a non-smoker with asbestos exposure will have only a small chance of contracting cancer from that exposure. Second, a smoker will have a significant risk of lung cancer (and various other health problems) even without exposure to asbestos, and the risk added by such exposure is small. In the first case it is implausible to claim that the asbestos exposure has caused a plaintiff to have any particular, reasonable fear of developing cancer. In the second, it is implausible to claim that any fear the plaintiff may feel is fairly attributable to asbestos. In either event, it would be inappropriate to hold that the individual's former employer has breached a legal duty to avoid exposing its employees to unreasonable fears.

[11] It is not an adequate response to purport to reduce a plaintiff's "fear of cancer" damages by some percentage to account for the "comparative fault" of smoking. *See* Br. in Opp. 6. Valuing a plaintiff's "fear" for purposes of awarding damages is an uncertain task in the first place. Attempting to assess what portion of a smoker's fear of cancer could or should be attributed to asbestos exposure takes the exercise well into the realm of speculation.

CONCLUSION

The judgments below should be reversed.

Respectfully submitted.

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